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(2)

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM GERBER,

PETITIONER,

V.

RODERICK HICKMAN,

RESPONDENT.

On Petition of Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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MOTION OF THE PECHANGA BAND OF LUISENO MISSION INDIANS FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Richard T. Williams
Counsel of Record
James K. Kawahara
Alex R. Baghdassarian
Alan J. Watson
HOLLAND & KNIGHT LLP
633 West Fifth Street, 21st Fl.
Los Angeles, CA 90071
Telephone: (213) 896-2400

Leo G. Rydzewski
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006
Telephone: (202) 955-3000

Counsel For
The Pechanga Band of Luiseno Mission Indians

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MOTION OF THE PECHANGA BAND OF LUISENO MISSION INDIANS FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Relief Sought

Pursuant to Rule 37.2(b) of the Rules of this Court, *Amicus curiae,* the Pechanga Band of Luiseno Mission Indians, move for leave to file the attached Brief of *Amicus Curiae* in Support of the Petitioner.

Name Of Party Withholding Consent To Filing *Amicus* Brief

Petitioner William Gerber has consented to the filing of the brief. This motion is necessary because Respondent Roderick Hickman (hereinafter referred to as "the warden") has denied consent.

Nature Of Movant's Interest

The Ninth Circuit's determination that an inmate's right to procreate with his wife is fundamentally inconsistent with incarceration conflicts with the Court's precedent governing inmate rights. It is also contrary to the rights afforded inmates under California's Constitution.

The proposed means of procreation, artificial insemination via delivery of the inmate's semen sample outside the prison walls, also impacts the rights of a non-prisoner spouse because it involves outgoing mail. A heightened scrutiny review under the Court's holding in *Procunier v. Martinez*, 416 U.S. 396 (1974), *Turner v. Safley*, 482 U.S. 78 (1987) and *Thornburgh v. Abbott*, 490 U.S. 401 (1989) makes it clear that the warden's decision cannot be sustained. At the very least, a factual inquiry had

to be conducted under *Turner v. Safley*, 482 U.S. 78 (1987) to determine if the warden's decision was reasonably related to legitimate penological interests.

Petitioner's wife is a member of a federally-recognized Indian Tribe, *amicus* herein. By upholding the warden's decision to de facto sterilize petitioner for life, the Ninth Circuit has condoned a decision by the state to interfere with the propagation of certain groups and races – a danger the Court recognized and struck down in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

The Tribe respectfully requests the Court's permission to submit the accompanying *amicus* brief to address this important Constitutional issue.

Dated: October 17, 2002 Respectfully submitted,

Richard T. Williams
Counsel of Record
James K. Kawahara
Alex R. Baghdassarian
Alan J. Watson
HOLLAND & KNIGHT LLP
633 West Fifth Street, 21st Fl.
Los Angeles, CA 90071
Telephone: (213) 896-2400

Leo G. Rydzewski
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006
Telephone: (202) 955-3000

Counsel For The Pechanga Band of Luiseno Mission Indians

QUESTION PRESENTED

The Ninth Circuit upheld respondent's motion to dismiss petitioner's claim to be allowed to procreate with his wife by means of artificial insemination, without any attempted showing that the bar is related to penological interests. In effect, the court of appeals has determined that an inmate has no Constitutional protections, even if a prison regulation is not "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 84 (1987). This case is particularly troublesome because the Ninth Circuit's decision derails the Constitutional right to have children of thousands of married male inmates confined in California's state penal system. At the same time, it strikes down, without any rationale reason, the rights of thousands of wives to have children with their husbands.

Support of one's family is conducive to stability in an inmate population and directly benefits penological interests: "The value of visiting as a means to establish and maintain meaningful family and community relationships is recognized and encouraged." Cal. Code Regs. title 15, § 3170(a) (2002). A prisoner who maintains family ties is one who is less likely to be problematic for the correctional facility. Yet, in this instance, the prison warden, for no reason related to a legitimate penological interest, has denied a husband and wife the right ever to have children together, by any means of conception.

The question presented is: Does a married inmate's right to have children with his wife survive incarceration when there is no showing of any contrary penological interest?

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae, the Pechanga Band of Luiseno Mission Indians (the "Tribe"), is a federally-recognized Indian tribe, *see* 65 Fed. Reg. 13298 at 13300 (March 12, 2000).[1] Evelyn Gerber, the spouse of petitioner William Gerber, is a member of the Tribe. Under the laws of the Tribe, Mr. and Mrs. Gerber's child would be eligible for tribal membership. The Tribe has a substantial interest in protecting the right of its member, Mrs. Gerber, to procreate and bring a child into this world.

Mrs. Gerber is a member of the Tribe's Cultural Committee, and she is the tribally-designated caretaker of the Ringing Rock Sacred Site located near the Tribe's reservation in Temecula, California. Mr. and Mrs. Gerber intend on raising their future children in the traditional Luiseno culture and language.

The Tribe has a federally-recognized interest in protecting the interests of its members, including children that are eligible for tribal membership. The Indian Child Welfare Act, 25 U.S.C. §§ 1901 - 1914, recognizes that "there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as a trustee, in protecting

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[1] Counsel for the *amicus curiae* authored this brief in its entirety. No person or entity other than the *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The letter from the petitioner consenting to the filing of this brief has been lodged with the Clerk of the Court. Respondent has denied consent.

Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). The Tribe, therefore, has an interest in challenging the warden's arbitrary denial of Mr. and Mrs. Gerber's request for artificial insemination.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002) directly conflicts with applicable decisions of this Court with respect to an important issue – the fundamental right of a married inmate to have a child with his wife. The deprivation of this right is all the more troubling because the Ninth Circuit upheld the granting of the warden's motion to dismiss by ignoring the Court's standards governing prisoner rights set forth in *Turner v. Safley*, 482 U.S. 78 (1987) and *Procunier v. Martinez*, 416 U.S. 396 (1974).

This matter is of importance under Rule 10 of the Court because it implicates the Constitutional rights of more than 1,400 married male prisoners sentenced under California's 3-strikes law who are incarcerated in the state of California penal system, it has an impact beyond the prison walls as it affects the Constitutional rights of spouses of married prisoners, and it conflicts with, and impacts the development of, the law with regard to prisoner rights under the Court's applicable precedent.

Where the issue is whether an inmate can mail a DNA sample (blood, semen or otherwise) outside the prison walls, a heightened scrutiny review of a prison administrator's decision to interfere with that process is called for. At the very least, a fact inquiry into whether the inmate's request has an impact on penological interests must be conducted before the inmate is deprived of the

Constitutional Right to ever have children, because of the nature of the sentence which the inmate is serving.

The state should not be permitted to deprive any individual of the fundamental right to have children where there is no showing that an inmate's right to procreate via artificial insemination has any impact on penological interests.

ARGUMENT

I. The Ninth Circuit's Determination That Mr. Gerber's Right To Procreate Does Not Survive Incarceration Conflicts With The Standards Established By This Court And With The Holdings Of Other United States Courts Of Appeals

A. Respondent's Denial Of Petitioner's Constitutional Right To Procreate Is An Impermissible Exercise Of Racial And Genetic Control By The State Of California

Certiorari is appropriate pursuant to Supreme Court Rule 10(c) because the Ninth Circuit's decision in *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002) directly conflicts with applicable decisions of this Court with respect to an important issue – the fundamental right of a married inmate to one day have a child with his wife.[2]

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[2] *See also* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 4.5 at 232-233 (8th ed. 2002) (hereinafter "Stern & Gressman") ("A direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari.")

In striking down a state statute mandating forced sterilization for certain habitual criminals, the Court in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) determined that the right to procreate is "one of the basic civil rights of man" and that "marriage and procreation are fundamental to the very existence and survival of the race." The Court warned that in "evil or reckless hands" a state's decision to prevent its inmates from having children can have a devastating impact, causing "races or types which are inimical to the dominant group to wither and disappear." *Id.* The "reckless hands" the Court foreshadowed in *Skinner* is reality in 21st Century California. The warden's decision to deny petitioner's request to artificially inseminate his wife has a direct impact on the propagation of the Tribe – a Native American race that lived in California long before the "state" came into existence – because it forecloses any possibility that Mrs. Gerber, who is in her mid-forties, can have children with her husband, who is serving a one hundred years to life plus eleven years prison sentence. As Judge Kozinski stated in his dissenting opinion in *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002):

> By cutting off Gerber's fundamental right to procreate, prison authorities have enhanced Gerber's punishment beyond that authorized by statute, and consigned Mrs. Gerber to a childless marriage. *Id.* at 632.

At a time when modern medicine, by means of artificial insemination, allows Mrs. Gerber to bear children without any impact on prison security, a prison warden has decided to exercise racial and genetic control and has relegated Mrs. Gerber to a life sentence – one without the possibility of having children with her husband. The warden's decision is also incomprehensible because stable family ties, and visitation by inmates' family members, are

recognized to be in the penal interest: "The value of visiting as a means to establish and maintain meaningful family and community relationships is recognized and encouraged." Cal. Code Regs. title 15, § 3170(a) (2002).

The warden's decision has "forever deprived [Mrs. Gerber] of a basic liberty" – the right to have children with her husband. *Skinner*, 316 U.S. at 541. The deprivation of this right is all the more troubling because the Ninth Circuit completely ignored the Court's standards governing prisoner rights in *Turner v. Safley*, 482 U.S. 78 (1987) and upheld a prison administrator's capricious decision that has no bearing on any penological interest.

B. Heightened Scrutiny Is Required When Dealing With Inmates' Outgoing Mail Because It Affects The Constitutional Rights Of Third Parties.

This matter is of importance under Rule 10 because the decision to deny inmates' fundamental right to procreate implicates the Constitutional rights of more than 1,400 married male prisoners sentenced under California's 3-strikes law who are incarcerated in the state of California penal systems,[3] has an impact beyond the prison walls and on the

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[3] There are 7,291 male 3-strikes inmates serving 25 year to life sentences in California. *See Second and Third Strikers in the Institution Population*, June 30, 2002, California Department of Corrections, p. 2 (July 2002), available online at www.cdc.state.ca.us/pdf/strike0602.pdf. And, according to 1997 data from the Bureau of Justice Statistics, twenty-three percent (23%) of inmates in state prisons are married. *See* C.J. Mumola, *Incarcerated Parents and Their Children*, Special Report of the Bureau of Justice Statistics, U.S. Dept. of Justice, Table 3 at 3 (August 2000), available online at www.ojp.usdoj.gov/bjs/ (hereinafter referred to as "Incarcerated Parents").

The total male inmate population in California's state prison system is 150,321 as of August, 2002. *See* California Department of Corrections Monthly Report of Population as of Midnight August 31, 2002. Report

Constitutional rights of spouses of married prisoners, and conflicts with, and impacts the development of, the law with regard to prisoner rights under the Court's earlier decisions in *Procunier v. Martinez*, 416 U.S. 396 (1974), *Turner v. Safley*, 482 U.S. 78 (1987) and *Thornburgh v. Abbott*, 490 U.S. 401 (1989).[4] Where the issue is whether an inmate can mail a DNA sample (blood, semen or otherwise) outside the prison walls, a heightened scrutiny review of a prison administrator's decision to interfere with that process is called for.

As this Court indicated, prison regulations may not unnecessarily infringe upon the Constitutional rights of non-prisoners. *Procunier v. Martinez*, 416 U.S. 396 (1974), *partially overruled on other grounds by, Thornburgh v. Abbott*, 490 U.S. 401 (1989). In *Martinez*, the Court explained that its review of prison restrictions on inmate correspondence involved more than merely examining an inmate's right to free speech, but rather those of free citizens as well:

> [C]ensorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners. *Id.* at 409.

The Court's decision in *Martinez* "turned on the fact that the challenged regulation caused a consequential restriction on [Constitutional] rights of those who are not prisoners." *Turner v. Safley*, 482 U.S. 78, 86 (1987). Because the Court did not view the *Martinez* case strictly as a prisoner's rights case, the Court employed the heightened

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available online at www.cdc.state.ca.us/reports/Archive_PDF/Monthly/TotalPop/Aug2002.pdf.

[4] *See also* Stern & Gressman, § 4.11 at 243-244.

scrutiny test used in other instances to address "the general problem of incidental restrictions on First Amendment liberties." *Procunier v. Martinez*, 416 U.S. at 409.

In *Turner v. Safley*, 482 U.S. 78 (1987), the Court acknowledged that while *Martinez* addressed the rights of non-prisoners, the questions before it involved prisoner's rights – restrictions on inmate marriages and inmate-to-inmate correspondence. *Id.* at 85. Specifically, *Turner* acknowledged that *Martinez* could be applied to assess whether a prison regulation violates the fundamental right to marry of individuals who are not prisoners:

> [W]e note initially that the regulation prohibits marriages between inmates and civilians, as well as marriages between inmates. Although not urged by respondents, *this implication of the interests of nonprisoners may support the application of the Martinez standard, because the regulation may entail a consequential restriction on the constitutional rights of those who are not prisoners.* *Id.* at 97 (emphasis added).

With regard to a prisoner's right, the Court in *Turner* formulated a new standard of review that involved an inquiry into whether a prison regulation is reasonably related to legitimate penological interests. *Id.* at 89. It established a four-part test to determine the reasonableness of such regulations: (1) Whether there is a valid, logical connection between the regulation and the penological interest; (2) whether there are alternative means of exercising the asserted Constitutional right that remains open to inmates; (3) whether and the extent to which accommodation of the asserted right impacts prison staff, other inmates, and prison resources; and (4) the absence of any ready alternatives. *Id.*

Following an analysis of these factors, the *Turner* Court upheld the prison regulation governing correspondence between inmates, but struck down the regulation restricting inmate marriages. Although the standards announced by the Court in *Turner* seem straightforward, questions persist with respect to the application of those standards to situations where a prison regulation impacts not just the rights of inmates, but also, as here, curtails the Constitutional rights of non-prisoners.

Applying the *Turner* reasonableness standard, the Court in *Thornburgh v. Abbott*, 490 U.S. 401 (1989) determined that prison regulations which prevented inmates from receiving specific publications were valid because they protected prison security, were neutral with regard to the content of the expression regulated, were rationally related to security interests and alternative means of expression remained open to the inmates. The Court indicated that it was simply not "sufficient to focus" on whether the rights that were affected were those of prisoners or non-prisoners, *id.* at 410 n.9, and concluded that that the heightened scrutiny test announced in *Martinez* applied only to *outgoing* correspondence from prisoners, *id.* at 413. Although the Court specifically overruled that portion of the *Martinez* holding that distinguished between incoming correspondence from prisoners versus from nonprisoners, *id.* at 414, the *Thornburgh* decision did not abandon the need to consider nonprisoner rights.

In this case, respondent determined that petitioner should not be allowed to mail a DNA semen sample outside prison walls for purposes of artificially inseminating his wife. This decision was summarily made by the warden. It was upheld by the Ninth Circuit without any showing by the warden that the decision bore any logical relationship to penological interests, as the Court required in *Turner*. The

Ninth Circuit's holding is also contrary to the requirement pronounced in *Martinez*, and still valid under *Thornburgh*, that limitations on an inmate's outgoing mail be subjected to heightened scrutiny.

Had the Ninth Circuit undertaken an analysis under either *Turner* or *Martinez*, it would have been obvious that the warden's decision could not be sustained:

- First, California, along with more than two dozen other jurisdictions, has enacted legislation that permits inmates, post-conviction, access to DNA testing for purposes of challenging their conviction. *See* Cal. Penal Code § 1405 (2002);[5]

- Second, unlike some jurisdictions, California's post-conviction DNA testing statute does not mandate the use of state labs for the DNA testing.

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[5] *See also* Ariz. Rev. Stat. 13-4240 (2002); Ark. Code Ann. 16-112-124 to -129 (Michie 2001); Del. Code Ann. tit. 11, 4504 (2001); D.C. Code Ann. 4031-4035 (2001 & Supp. 2002); Fla. Stat. ch. 925.11(1)(a) (2001); Idaho Code 19-2719 (Michie 2002)(procedures for capital cases only); Idaho Code 19-4902 (Michie 2002); 725 Ill. Comp. Stat. 5/116-3 (2002); Ind. Code 35-38-7-1 to -19 (2001); La. Code Crim. Proc. Ann. art. 926.1 (2002); Me. Rev. Stat. Ann. tit. 15, 2137 (West 2001); Md. Code Ann., Crim. Proc. 8-201 (2001); Mich. Comp. Laws 770.16 (2002); Minn. Stat. 590.01 (2002); Mo. Rev. Stat. 547.035 (2002); Neb. Rev. Stat. 29-4117 to -4125 (2001); N.J. Stat. Ann. 2A:84A-32a (West 2002); N.M. Stat. Ann. 31-1A-1 (Michie 2001); N.Y. Crim. Proc. Law 440.30 (Consol. 2001); N.C. Gen. Stat. 15A-269 (2002); Okla. Stat. tit. 22, 1371, 1371.1 (2002); Okla. Stat. tit. 22, 1372 (2001); S.B. 667, 2001 Leg., 71st Sess. (Or. 2001); Tenn. Code Ann. 40-30-401 to -413 (2002); Tex. Code Ann. Crim. Proc. art. 64.03 (2002); Utah Code Ann. 78-35a-301 to -304 (2001); Va. Code Ann. 19.2-327.1 (2001); Wash. Rev. Code 10.73.170 (2002); Wisc. Stat. 974.07 (2002).

California's statutory scheme contemplates the parties (*i.e.*, the state and the prisoner) will use a private lab for such testing. *See* Cal. Penal Code § 1405(g); and

- Third, California has a statutory scheme by which its prison system collects materials that contain DNA samples from inmates, including blood samples, to allow for expeditious detection and prosecution of criminals, as well as to exclude suspects under investigation. *See* DNA and Forensic Identification Data Base and Data Bank Act of 1998, Cal. Penal Code § 295 *et seq.* (2002).

California's legislature has determined that convicted inmates can undergo DNA testing – both for purposes of obtaining exculpatory evidence to fight a conviction, and in order to provide forensic identification data for criminal investigations. The state prison wardens have no say in permitting or denying such testing because, obviously, under a *Turner* analysis, the DNA testing has no bearing on penological interests. As with DNA testing permitted under Cal. Penal Code § 1405, the DNA sample in this instance would be mailed out of the prison. Under *Martinez* and *Thornburgh*, the warden's denial of petitioner's outgoing mail cannot withstand heightened scrutiny review: If a California prison is able to mail or ship DNA samples to a private lab in connection with a Penal Code § 1405 Motion for DNA Testing, it can likewise mail a DNA sample to a lab for artificial insemination – the use of the DNA sample outside the prison walls is certainly of no concern to the warden and does not impact prison security.

C. An Inmate's Spouse's Constitutional Right To Procreate Should Be One Of The Factors Considered In A *Turner* Analysis

Certiorari should be granted pursuant to Rule 10(a) because the Ninth Circuit's decision in *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002), as to whether a person's right to procreate survives incarceration, is in conflict with the decision of the Third Circuit in *Monmouth County Correctional Institution Inmates v. Lanzarro*, 834 F.2d 326 (3d Cir. 1987). Moreover, the Eighth Circuit's holding in *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990) assumed, without deciding, that procreation survives incarceration.

Amicus will not discuss in detail the conflict between the Ninth Circuit decision and the holding of the Third Circuit in *Monmouth County*. That issue has been addressed in petitioner's brief. However, Amicus will address how the Court could resolve this conflict, while providing guidance on the issue of prison regulations that impact the rights of non-prisoners, based on the Court's own precedent.

Following the Court's decision in *Thornburgh*, lower courts have dismissed, as irrelevant, the rights of nonprisoners impacted by prison regulations.[6] And, the Ninth Circuit majority, in the present case, did not even address nonprisoner rights in its decision to deny petitioner the right to procreate.

In his dissenting opinion in *Gerber*, Judge Kozinski acknowledged that the rights of non-inmate third parties

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[6] In *Goodwin v. Turner*, 908 F.2d 1395, 1399 (8th Cir. 1990), the Eighth Circuit denied an inmate's request to artificially inseminate his wife. The court determined that prison regulations cannot be subjected to strict scrutiny when a family member is affected by a prison regulation.

must to be taken into account in determining the constitutionality of a prison regulation that infringes on a nonprisoner's right to procreate:

> ...[P]rocreation (at least within the marital relationship) is a fundamental right. Such a right may be abrogated only pursuant to lawful authority and for compelling reasons. The reasons here must be particularly strong because the burden of this prohibition falls not only on Gerber, but also Mrs. Gerber, who is precluded from bearing a child fathered by her husband. As the Supreme Court noted in *Turner*, *when a prison regulation creates a "consequential restriction on the [constitutional] rights of those who are not prisoners," it will be subjected to more searching scrutiny than when the burden falls only on inmates.* *Gerber v. Hickman*, 291 F.3d at 631 (citations omitted) (emphasis added).

Judge McMillian noted in his dissent in *Goodwin* that the rights of an inmate's spouse should be considered in applying the *Turner* reasonableness test. Specifically, he recommended that the alternative means available to a non-prisoner for exercising a right also be considered:

> Although the second *Turner* factor focuses on the nature of the deprivation of the inmate's right, I believe it is also appropriate to consider the deprivation of the rights of noninmates...Mrs. Goodwin's fundamental right to procreate within a marriage relationship is completely foreclosed by the Bureau's policy, at least until Goodwin's release from prison. *Goodwin v. Turner*, 908 F.2d at 1406 n.6.[7]

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[7] Unlike Goodwin, Mr. Gerber is never going to be released from prison as a result of his one hundred years to life plus eleven years prison sentence.

To provide further guidance to the lower courts and to resolve the conflict among the courts of appeals, in those instances when a prison regulation impacts the Constitutional rights of non-inmates, the Court is respectfully requested, to affirm that a consideration of the regulation's impact on the Constitutional rights of such third parties is appropriate.

D. An Inmate's Right To Procreate By Means Of Artificial Insemination Is Not Inconsistent With His Status As A Prisoner

The Ninth Circuit's erroneous decision has far greater implications than on just the parties to this case. Whether an inmate's right to procreate is consistent with his status as a prisoner is a decision that, potentially, will impact more than 52,000 married prisoners confined in the penal systems of the states that are subject to the jurisdiction of the Ninth Circuit Court of Appeals.[8] This is not an isolated issue that solely impacts Mr. Gerber's Constitutional rights; the Ninth Circuit decision has a direct ramification on the Constitutional rights of the thousands of married inmates, and their spouses, living in California.[9] Because the Ninth Circuit's rationale in support of its decision is in direct conflict with the Court's precedent in *Turner v. Safley*, 482

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[8] More than 243,000 inmates are confined in prisons within the Ninth Circuit. *See* P. M. Harrison and A. J. Beck, *Prisoners in 2001*, Bulletin of the Bureau of Justice Statistics, U.S. Dept. of Justice, Table 3 at 3 (July 2002), available online at www.ojp.usdoj.gov/bjs/ (hereinafter referred to as "Prisoners in 2001"). The prisoner statistics for the Ninth Circuit do not include figures for the Territory of Guam or the Commonwealth of the Northern Mariana Islands. Since 23% of inmates are married, approximately 52,000 inmates housed in prisons within the Ninth Circuit should be married. *See* Incarcerated Parents, fn. 3, *supra*.

[9] *See* Incarcerated Parents (twenty-three percent (23%) of the inmates in state prison systems are married), fn. 3, *supra*.

U.S. 78 (1987), redress by grant of certiorari is warranted under Rule 10(c). *See, e.g., Lambert v. Wiklund*, 520 U.S. 292, 293 (1997) (certiorari granted "because the Ninth Circuit's holding is in direct conflict with our precedents.") *See also* Stern & Gressman § 4.5 at 232-233.

In *Turner v. Safley*, 482 U.S. 78 (1987), this Court established a two-prong test to consider the impact of prison regulations on prisoners' Constitutional rights. The Court held that "a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correction system.' " *Id.* at 95, citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974). The Court then explained the standards to be applied to each prong of this two-part test.

With respect to the first-prong, whether a prisoner's constitutional rights are "inconsistent with his status as a prisoner," the inquiry is whether the right at issue is "unaffected by the fact of confinement or the pursuit of legitimate corrections goals." *Turner*, 482 U.S. at 96. In other words, the lower courts had to assess whether sufficient "elements" or "incidents" of a prisoner's Constitutional rights survived incarceration. *Id.*

Instead of adhering to the Court's precedent in *Turner*, the Ninth Circuit held that the right to procreate is inconsistent with incarceration based on a different standard: "[C]onsideration of the nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation." *Gerber v. Hickman*, 291 F.3d at 622. The Ninth Circuit's adoption of this subjective new standard is at odds with the Court's *Turner* decision. Under the guise of "the nature and goals of the correctional system," the Ninth Circuit imposes no limits on the denial of prisoners' fundamental Constitutional rights,

save, perhaps, violations of the Eighth Amendment prohibition against cruel and unusual punishment. The Ninth Circuit was not at liberty to ignore this Court's precedent and to establish a different and subjective standard which creates a nearly irrebuttable presumption that would uphold prison regulations in violation of an inmate's Constitutional rights.

As stated by J. Tashima, writing for the dissent in *Gerber v. Hickman*, 291 F.3d 617 (2002):

> The majority cites the "nature and goals of a prison system," but fails to identify even one way in which accommodating Gerber's request would be inconsistent with the legitimate needs of prison facilities. *Id.* at 626.

Although J. Kozinski joined in J. Tashima's dissent, he further elaborated on this point in his dissent:

> The majority hinges its opinion on the proposition that "the right to procreate is fundamentally inconsistent with incarceration," Maj. Op. At 7584, but does not explain how. *Id.* at 629.
>
> Is procreation one of those rights the exercise of which is inconsistent with the prisoner's loss of his freedom of locomotion? Apparently not, at least as Gerber proposes to exercise it. Gerber is not asking to go home for a conjugal visit, not to enjoy such a visit within the prison; *he does not seek to loosen the strictures of his confinement in the least.* Gerber asks only to engage in activities that prisoners are already free to engage in (see steps 1-3 above). That these activities [ejaculating into a plastic cup to be mailed from the prison] might result in the creation of

> a life outside prison walls is no more inconsistent with Gerber's status as a prisoner than is any other consequence of mailing materials from prison to the outside world. *Id.* at 630 (emphasis added).

Had a factual inquiry been conducted under *Turner*, it would have become apparent that various aspects of petitioner's right to procreate are "unaffected" by his confinement. For example, petitioner's ability to have a child with his wife (i) is a reaffirmance of, and exercise of, his and his wife's Christian faith, (ii) would provide emotional support and love to petitioner over the long-term of his confinement, and (iii) would demonstrate petitioner's personal commitment and dedication to his wife and family. These attributes survive incarceration and in fact should contribute to stability within the penal system.

There is nothing on the record, in connection with respondent's Fed. R. Civ. P. 12 motion to dismiss, that allowed the Ninth Circuit to conclude, as a matter of law, that petitioner's fundamental right to procreate does not survive incarceration, especially by means of artificial insemination through the use of outgoing mail from the prison. At the very least, the Ninth Circuit should have considered whether there are "incidents" of the right to procreate which are "unaffected" by the fact of petitioner's confinement "or the pursuit of legitimate corrections goals" and whether "these remaining elements form a constitutionally protected [right] in the prison context." *Turner,* 482 U.S. at 96. That is the analysis the Court engaged in with respect to the marriage regulation which was at issue in *Turner*, and that is the same factual inquiry which the lower courts were required to undertake in this instance.

Alternatively, *amicus* respectfully asks the Court to further instruct the lower courts with regard to the factors

that must be considered in determining whether a prisoner's constitutional rights are "unaffected" by incarceration or are "inconsistent" with his status as a prisoner.

II. Fundamental Notions Of Due Process Confirm That, In California, Incarceration Does Not Terminate The Constitutional Right To Procreate.

Certiorari is appropriate under Rule 10(c) because the Ninth Circuit's decision is contrary to precedent of this Court, which holds that procreation, within the marital relationship, is a fundamental right. *See Griswold v. Connecticut*, 381 U.S. 479 (1965). Moreover, the Ninth Circuit's ruling is clearly erroneous and violates fundamental rights available to petitioner, and to thousands of other prisoners, under California's Constitution. Therefore, certiorari is also appropriate pursuant to the Rules of Decision Act, 28 U.S.C. § 1652.[10]

In his dissenting opinion, Judge Kozinski noted that the warden's decision could not be sustained because it violates notions of due process – after all, the California Department of Corrections allows conjugal visits and "some of these visits will result in procreation." *Gerber v. Hickman*, 291 F.3d at 631. Judge Kozinski also pointed out that there was no evidence of any legislative intent to cut-off an inmate's right to procreate. *Id.* Judge Kozinski was absolutely correct.

"The power to deprive a prisoner of his civil rights and to restore them is one that resides in the Legislature." 15 Cal. Att. Gen. Ops. 38 (1950), citing *Calif. Highway Comm. v. Indus. Acc. Comm.*, 200 Cal. 44, 48, 251 P. 808 (1926) (legislative intent was to provide certain limited civil

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[10] *See Frisby v. Schultz*, 487 U.S. 474, 482 (1988); Stern & Gressman § 4.10 at 242-243.

rights to inmates engaged in work program). In fact when California's Legislature initially enacted Cal. Penal Code § 2600 (hereinafter "Section 2600"), the provision became known as "the civil death doctrine" because it deprived inmates of most fundamental rights.

As a result of the 1975 revisions to Section 2600, prisoners in California could "be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public." The term "rights" under Section 2600 was defined by the California Supreme Court to mean those rights afforded to non-confined individuals residing in California. *DeLancie v. Superior Court*, 31 Cal. 3d 865, 868, 647 P.2d 142, 183 Cal. Rptr. 866 (1982), *overruled on other grounds*, *People v. Loyd*, 27 Cal. 4th 997, 45 P.3d 296, 119 Cal. Rptr. 2d 360 (2002). And, the California Supreme Court in *In re Arias*, 42 Cal. 3d 667, 690-691, 725 P.2d 664, 678 230 Cal. Rptr. 505, 519 (1986) confirmed that the "rights" at issue under Section 2600 "must begin with a discussion of the rights of non confined citizens." In *rejecting* the notion that "rights" under Section 2600 are "circumscribed by cases that define prisoners' rights under the federal Constitution," the California Supreme Court stated: "This is not a proper approach for analyzing claims under that statute." *Id.* at 690, 725 P.2d at 678, 230 Cal. Rptr at 518. And, the right to procreate is not only protected by the First and Fourteenth Amendments to the United States Constitution, it is also protected under the California Constitution. *See Conservatorship of Valerie N.*, 40 Cal. 3d 143, 161, 707 P.2d 760, 219 Cal. Rptr. 387 (1985).

California's Legislature further amended Section 2600 in 1994. The provision now uses language identical to the second-prong of the *Turner* test and states that a prisoner

may be deprived of such rights "as is reasonably related to legitimate penological interests." Although a factual inquiry under the second-prong of the *Turner* test must be conducted to determine if a regulation "is reasonably related to legitimate penological interests," the express language of Section 2600, and the California Supreme Court's ruling in *Thompson v. Department of Corrections*, 25 Cal. 4th 117, 130, 18 P.3d 1198, 105 Cal. Rptr. 2d 46 (2001), left unchanged the preliminary inquiry under Section 2600: "Rights" afforded to prisoners are the same ones which are possessed by non-confined residents of California.

The Ninth Circuit failed to take account of the California Supreme Court decisions in *DeLancie*, *In re Arias* and *Conservatorship of Valerie N.* which establish that Mr. Gerber has a fundamental right to procreate under the California Constitution. There is no predicate determination of whether a constitutional "right" survives incarceration under California law. The Ninth Circuit's ruling in this regard conflicts with the pronouncement of the state of California's highest court with respect to the meaning of "rights" under Section 2600.

Because Mr. Gerber and all other prisoners residing in California are presumed to have the same rights as non-incarcerated individuals, the Ninth Circuit could not, as a matter of law, determine that the right to procreate does not survive incarceration. The Ninth Circuit committed clear error, and this Court should grant certiorari to correct this error which will impact the state Constitutional rights of thousands of prisoners confined in the California state prison system.

CONCLUSION

An inmate's right to procreate, by means of artificial insemination outside prison walls, has no bearing on penological interests. An inmate's ability to maintain and strengthen family bonds by having children with his wife can ultimately make the inmate's confinement easier for his jailers. Without rationale reason, the state should not have the ability to deprive any individual of the fundamental right to have children. In this case, that decision also flies in the face of the dangers perceived by this Court in *Skinner* with respect to race control. The Tribe respectfully urges the Court to grant certiorari and to reverse the Ninth Circuit majority decision.

Dated: October 17, 2002 Respectfully submitted,

Richard T. Williams
Counsel of Record
James K. Kawahara
Alex R. Baghdassarian
Alan J. Watson
HOLLAND & KNIGHT LLP
633 West Fifth Street, 21st Fl.
Los Angeles, CA 90071
Telephone: (213) 896-2400

Leo G. Rydzewski
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006
Telephone: (202) 955-3000

Counsel For The Pechanga Band of Luiseno Mission Indians